78-139

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 78-139

CHEVRON CHEMICAL COMPANY-
ORONITE DIVISION,
Petitioner,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
MECHANICAL CONTRACTING ENGINEERS, INC.
AND MR. WILLIAM F. COLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
October Term, 1973

No.

CHEVRON CHEMICAL COMPANY -
ORONITE DIVISION,
Petitioner,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
MECHANICAL CONTRACTING ENGINEERS, INC.
AND MR. WILLIAM F. COLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Chevron Chemical Company - Oronite Division, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the April 23, 1973 judgment by the United States Court of Appeals for the Fifth Circuit in No. 72-1025 entitled "WILLIAM F. COLE, Plaintiff-Appellant, versus CHEVRON CHEMICAL COMPANY - ORONITE DIVISION, Defendant-Appellee, MECHANICAL CONTRACTING ENGINEERS, INC., and LIBERTY

MUTUAL INSURANCE COMPANY, Third-Party Defendants-Appellees-Appellants", Opinion April 23, 1973, 5 Cir. 1973, ____ F.2d ____, which affirmed in part and reversed in part the July 30, 1971 findings of fact, the October 7 and December 20, 1971 opinions and January 4, 1972 judgment by the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, in Civil Action No. 68-1943C entitled "WILLIAM F. COLE versus CHEVRON CHEMICAL COMPANY - ORONITE DIVISION," which are in part reported as *Cole* versus *Chevron Chemical Company*, 334 F.Supp. 263 (1971).

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered April 23, 1973. A petition for rehearing en banc was filed by petitioner on June 6, 1973 and was denied in a per curiam opinion on June 19, 1973. A motion was made for the stay of mandate pending the filing of this petition for certiorari and was granted on July 5, 1973 to and including August 5, 1973.

Jurisdiction to review this case upon writ of certiorari is authorized and created by U.S.C.A. Title 28, Section 1254(1). See: *General Talking Pictures Corporation* versus *Western Electric Company, Inc., et al.*, 304 U.S. 175 (1937); *The Tungus* versus *Skovgaard*, 358 U.S. 588 (1959); and, *Goett* versus *Union Carbide Corp.*, 361 U.S. 340 (1960)

OPINIONS BELOW

The findings, opinions and judgment, by the District Court of the United States, as well as the judgment, opinion and denial of the petition for rehearing en banc by the United States Court of Appeals for the Fifth Circuit are printed in the Appendix.

QUESTIONS PRESENTED FOR REVIEW

Whether as a matter of law, the Trial Court correctly awarded to petitioner the stipulated legal fees and costs incurred arising out of the conventional indemnity and insurance agreements among the parties, which judgment was reversed by the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

Respondent, Mr. William F. Cole, a laborer-welder, sued petitioner, Chevron Chemical Company - Oronite Division (hereinafter called Chevchem), in the District Court of the United States under the provisons of U.S.C.A. Title 28, Section 1332, for injuries allegedly sustained in a February 16, 1968 slip-and-fall incident on its premises, while in the course and scope of his employment by and under the control, direction and supervision of respondent, Mechanical Contracting Engineers, Inc. (hereinafter called Mechanical). In response to the complaint, Chevchem was compelled and forced to assert a third-party complaint over against Mechanical and its insurer, respondent Liberty Mutual Insurance Company (hereinafter called Liberty

Mutual), on the basis of contractual indemnity and insurance agreements among the parties pertinent to the work being performed by Mr. Cole at the time of his alleged accident.

Upon completion of delayed discovery, motions to dismiss and/or for summary judgment with supporting affidavits were filed in the Trial Court by Chevchem against Mr. Cole under the application and provisions of LSA-R.S. 23:1032 and 1061, to the extent that at all times pertinent he was as a matter of law a statutory employee and could not maintain a tort action against Chevchem in its principal/subcontractor relationship with Mechanical. The Trial Court on October 23, 1969, after earlier argument, granted a limited judgment to Chevchem in this multiparty action, dismissing the complaint, from which an earlier appeal was taken by Mr. Cole.

The United States Court of Appeals for the Fifth Circuit in accordance with the provisions of Local Rule 18 placed the appeal on the summary calendar and the panel concluded "... that this case is of the character that does not justify oral argument, . . .". In reversing the summary judgment and remanding because "... material factual issues remain to be tried . . .", that Appellate Court observed that the ". . . picture of Chevron's operations at its Oronite Division Plant is not clear." *Cole* versus *Chevron Chemical Company,* 427 F.2d 390 (1970) at pages 392-394.

Thereafter, the factual issues raised by Mr. Cole in the complaint against Chevchem were tried by a jury

and those arising out of Chevchem's third-party complaint against Mechanical and Liberty Mutual, were subsequently tried independently by the District Court of the United States without a jury. In the face of an adverse decision by the jury, the Trial Court granted Chevchem's motion for judgment notwithstanding the verdict and in the non-jury trial awarded it the stipulated legal fees and costs against Mechanical and Liberty Mutual on the contractual indemnity and insurance demands in the third-party complaint, from which appeals were taken by Mr. Cole, Mechanical and Liberty Mutual.

The United States Court of Appeals for the Fifth Circuit on April 23, 1973 affirmed the judgment notwithstanding the verdict granted Chevchem, but reversed the award to it of the stipulated legal fees and costs. A petition for rehearing en banc was timely filed, but promptly denied in a June 19, 1973 opinion.

REASONS RELIED ON FOR GRANTING THE WRIT OF CERTIORARI

It is the contention and position of Chevchem that the United States Court of Appeals for the Fifth Circuit has in the April 23, 1973 opinion decided an important question of law which is now in conflict with the applicable laws of the State of Louisiana.

In pages 12, 13, 14, 15 and 16 of the printed April 23, 1973 opinion, the United States Court of Appeals for the Fifth Circuit concludes that the pertinent indemnity agreement between Chevchem and Mechani-

cal, which was insured by Liberty Mutual, did not afford coverage for the stipulated legal fees and costs incurred by Chevchem in defense of the meritless claims advanced by plaintiff-appellant.

Initially, as an employee of the independent contractor Mechanical, Mr. Cole sued Chevchem for damages allegedly sustained in the course and scope of his work as a result of a February 16, 1968 accident. At the time thereof, Mechanical was performing services in furtherance of a written indemnity agreement with Chevchem, which was insured by Liberty Mutual.

On November 12, 1968, Chevchem was served with the complaint and promptly formally proffered its defense and indemnity to Mechanical and Liberty Mutual, requesting prompt acknowledgement and acceptance of the tenders. The allotted time passed without affirmative action on the part of Mechanical and Liberty Mutual, thereby compelling and forcing Chevchem to defend itself against the claims of Mr. Cole.

A third-party complaint was asserted in the responsive pleadings filed by petitioner and in the Trial Court as well as on appeal, it was determined that Mr. Cole's claims were without merit. However, while the Trial Court awarded Chevchem the stipulated legal fees and costs in the defense of Mr. Cole's meritless claims, the United States Court of Appeals for the Fifth Circuit reversed that portion of the judgment. It is the contention of Chevchem that as a matter of law it is entitled to recover this amount from Mechanical and Liberty Mutual, predicated on the pertinent portions

of the agreement with this independent contractor, which reads as follows:

"1.1 Independent Contractor: CONTRACTOR shall be an independent contractor, maintaining complete control over CONTRACTOR'S men and operations.

8. CONTRACTOR'S UNDERSTANDING: It is understood and agreed that CONTRACTOR, as the result of careful examination, is satisfied as to the nature and location of the work, the conformation and structure of the ground, the character, quality and quantity of the materials to be used, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general, and local conditions, and all other matters which can in any way affect the work under this contract . . .

1.5 Safety Measures: *CONTRACTOR shall take all reasonable precautions to protect the work, workmen and the public; and shall provide, where reasonably necessary, barriers, guards, temporary bridges, lights and watchmen . . .*

4.1. Inspection: . . . *CONTRACTOR shall provide safe and proper facilities therefor. CONTRACTOR shall at all times during working hours keep a competent man in the immediate vicinity of the work to receive communications from COMPANY and to supervise the work.*

5.1 General Liability: *CONTRACTOR shall indemnify and save COMPANY harmless from and against any and all loss, damage, injury, liability and claims thereof for injuries to or death of persons, and all loss or damage to property of others, resulting directly or indirectly from CONTRACTOR'S performance of this contract.*" (Emphasis added.)

It is undisputed that Mechanical and Liberty Mutual knew at the time of the execution of the contract and the issuance of insurance coverage therefor that the contemplated work to be performed by individuals, such as Mr. Cole, was a hazardous occupation, for which insurance protection was needed and obtained. Moreover, from time to time it was known that these laborers were injured in the course and scope of their duties, resulting in claims being made and litigation instituted thereon. Surely, Mechanical and Liberty Mutual must have been aware that on the filing of such lawsuits, lawyers had to be employed, together with costs and expenses being incurred in the defense of such claims.

Mechanical agreed, as an independent contractor, to protect Chevchem for such claims as were made by Mr. Cole. Furthermore, the controlling language in the contract does not limit the indemnity of Chevchem by Mechanical as insured by Liberty Mutual to any claim successfully prosecuted by a workman. Simply stated, the wording used in the agreement unequivocally states " . . . any and all loss, damage, injury, liability and *claims* ..." (Emphasis added.)

Beyond question, the filing of the complaint by Mr. Cole constituted a claim within the conditions and terms of the agreement between Chevchem and Mechanical, which was insured by Liberty Mutual. See: *L. L. Bogle d/b/a Oil Field Maintenance Company and Travelers Insurance Company* versus *The California Company*, 369 F.2d 699 (1966) affirming *White* versus *The California Company, et al.*, 250 F.Supp. 586 (1966); *Seneca* versus *California Oil Company, et al.*, 244 F.Supp. 350 (1964); *Keystone Tankship Corporation* versus *Williamette Iron & Steel Company*, 222 F.Supp. 320 (1963); and *U.S.* versus *Tieger*, 138 F.Supp. 709 (1954). This specific intent and meaning of the agreement at the time of its execution must be deduced from the entire contract, the subject matter and the purposes thereof, together with all of the surrounding circumstances. *U.S. Fidelity & Guaranty Co.* versus *Wilson*, 41 F.2d 319 (1930); *White*, supra; and, *Seneca*, supra.

It cannot be denied that a logical and proper interpretation of the language used in the agreement requires a conclusion and finding that the parties fully meant to obligate and require Mechanical and Liberty Mutual, to defend Chevchem against all claims, meritorious or otherwise. In this connection the complaint on its face indicated a substantial potential liability, the defense of which required the services of highly competent legal counsel and the incurrence of costs and expenses in connection therewith. Under indemnity agreements similar to, but not as incisive as the agreement here at issue, the Courts have held that the principal could recover from the independent con-

tractor legal fees, costs and expenses in defending such a meritless claim.[1]

The fact that liability was or was not established against Chevchem, can have no significance.[2] In instances such as what is now before the Court where the indemnitor and its insurer by inaction failed to undertake their commitments, as a matter of law, the indemnitee was held entitled to protect itself by employing lawyers and incurring costs and expenses.[3] The rights of Chevchem, as specified in the agreement and insurance policy, supersede any civil, maritime or common law theory.[4]

Herein, we are not concerned with the doctrine of implied warranty of workmanlike services, in which indemnity over is granted on the showing a breach of contract. The sole issue before the Court is not the liabilities and rights of the parties under an implied warranty of workmanlike services as involved in *Ryan Stevedoring Co., Inc.* versus *Pan-Atlantic SS Corp.*, 350 U.S. 124 (1961), but the liabilities and rights of the parties on a proper construction and interpretation of a written indemnity agreement and policy of

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[1] *Ludwig Mowinckels Rederi* versus *Commercial Stevedoring Co.*, 256 F.2d 227 (1958); and, *Pure Oil Co.* versus *Geotechnical Corp.*, 129 F.Supp. 194 (1955).

[2] *White*, supra; *Gonzales* versus *Pennsylvania RR Co.* versus *Imparato Stevedoring Corp.*, 183 F.Supp. 779 (1960); and, *Chesapeake and Ohio Ry. Co.* versus *Bailey Production Corp.*, 163 F.Supp. 666 (1958).

[3] *U. S. Steel Corporation* versus *Emerson-Comstock Co., Inc.*, 141 F.Supp. 143 (1956); and, *B & G Electric Co.* versus *G. E. Bass & Co., Inc.*, 252 F.2d 698 (1956), cert. den. 357 U.S. 931.

[4] *Union Pacific Railroad Co.* versus *Bridal Veil Lumber Co.*, 219 F.2d 825 (1955).

insurance issued thereon. *Keystone*, supra; *White*, supra; and, *Seneca*, supra.

The realistic application and meaning of the pertinent provisions of the agreement and insurance policy for the work undertaken dictate that the circumstances surrounding the alleged accident is the exact and precise reason for their existence. Liberty Mutual collected premiums therefor, yet contrary to its representations has repeatedly and unconscionably refused to honor its commitment and obligations. This is the true issue in the case and the insurance policy must be read in the light of practical business demands and risks.[5]

Additionally and of paramount importance is the fact that the April 23, 1973 opinion by the United States Court of Appeals for the Fifth Circuit is in conflict with other more controlling law of the State of Louisiana as decided in *Jennings* versus *Ralston Purina Co.*, 201 So.2d 168 (1967); and, *Chaney* versus *The Travelers Insurance Company*, 249 So.2d 181 (1971), the latter rendered by the Supreme Court of Louisiana. The Trial Court in interpreting the indemnity agreement between Chevchem and Mechanical and upholding its validity, beginning at page 264, stated as follows:

> "Since Chevron and Mechanical had a contractual indemnity agreement, the cases dealing with the obligation of implied indemnity in the absence of contract are inapplicable. Compare Humble Oil and Refining Co. v. Naquin,

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[5]*Jewelers Mutual Ins. Co.* versus *Balough*, 272 F.2d 889 (1959).

5 Cir. 1969, 414 F.2d 912; Halliburton Company v. Norton Drilling Company, 5 Cir. 1962, 302 F.2d 431; General Electric Co. v. Cuban American Nickel Co., 5 Cir. 1958, 396 F.2d 89; United Gas Corp. v. Guillory, 5 Cir. 1953, 206 F.2d 49.

"It was not claimed in the pleadings or the pre-trial order that the written indemnity agreement did not accurately reflect the understandings between Chevron and Mechanical, or that it was ambiguous, and its interpretation must therefore be determined as a matter of law, based on the language used therein by the parties. Mills v. Fidelity & Casualty Co., 226 F.Supp. 786, at 790 aff'd per curiam, 5 Cir. 1964, 338 F.2d 341; and Arnold v. Stupp Corp., La. App. 1967, 205 So.2d 797 at 804.

"Louisiana courts, whose opinions we are obliged to follow in this diversity case, have held that a contract of indemnity will not be construed to indemnify against a loss resulting *solely* from the indemnitee's own negligent acts unless that intention is expressed in unequivocal terms. Arnold v. Stupp Corp., La. App. 1968, 205 So.2d 797. Compare Jennings v. Ralston Purina Co., La. App. 1967, 201 So.2d 168, which the court distinguished in *Arnold*. See also Gorsalitz v. Olin Mathieson Chemical Corp., 5 Cir. ____ F.2d ____ (Sept. 28, 1971, #30631); compare the discussion by this court in Despaux v. California Co., E.D. La. 1968, 286 F.Supp. 558. Louisiana, like most states, has indicated a tendency to construe indemnity a-

greements narrowly, particularly where, as here, they were drafted by the indemnitee. *Jennings, supra,* at 175; *Arnold, supra,* at 799.

"But the mandate that an agreement is to be read narrowly does not mean it is to be disregarded. The agreement must be given effect, according to the intention of the parties, for the contract is the law between them. Louisiana Civil Code Art. 1901."

CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted to review and reverse that part of the April 23, 1973 decision by the United States Court of Appeals for the Fifth Circuit which denied the award by the Trial Court to Chevchem for the stipulated legal fees and costs incurred arising out of the conventional indemnity and insurance agreements among the parties, because that Court has decided an important question of law which is now in conflict with the applicable laws of the State of Louisiana.

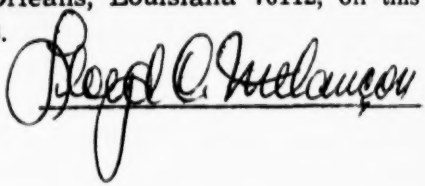
New Orleans, Louisiana, July 16, 1973.

Counsel for Petitioner

MESSRS. McLOUGHLIN, BARRANGER,
PROVOSTY AND MELANCON
Of Counsel

PROOF OF SERVICE

It is hereby certified that three copies of the above and foregoing petition were served by the writer depositing the same in a United States mail box with first class postage prepaid thereon addressed as follows: George J. Kambur, Esq., of Messrs. Kambur and Drury, 809 North Broad Street, 207 G.J. Kambur Building, New Orleans, Louisiana 70119; Clark A. Richard, Esq., 208 Southern Savings Building, New Orleans, Louisiana 70112; and John V. Baus, Esq., of Messrs. Jones, Walker, Waechter, Poitevent, Carrere and Denegre, 225 Baronne Street, New Orleans, Louisiana 70112, on this 16 day of July, 1973.



APPENDIX I

Art. 1901. Binding effect of agreements between parties

Art. 1901. Agreements legally entered into have the effect of laws on those who have formed them.

They can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law.

They must be performed with good faith.

APPENDIX II

§ 1032. Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations.

Nothing in this Chapter shall affect the liability of the employer to a fine or penalty under any other statute.

APPENDIX III

§ 1061. Principal contractors; liability

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any

person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the worker to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

APPENDIX IV

§ 1254. Courts of appeals; certiorari; appeal; certified questions

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

APPENDIX V

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of

which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, § 1, 78 Stat. 445.

APPENDIX VI

Filed: Aug. 2, 1971

IN THE
DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
NUMBER 68-1943
SECTION C

WILLIAM F. COLE,
Plaintiff,

versus

CHEVRON CHEMICAL COMPANY - ORONITE DIVISION,
Defendant.

July 30, 1971, FINDINGS OF FACT

* * * *

[2] THE COURT:
Be seated, please.

THE COURT:

All right, gentlemen, I am now going to make my findings of fact, which will be typed up and made available to you, and I think I am going to reserve judgment on the legal implications of some of these facts until I can review the additional supplemental briefs and think about it a little bit more.

The record shows and, of course, I find as a fact, the answers to the interrogatories propounded to the jury herein after the trial on the merits which shows that the jury found that the injury to Mr. Cole resulted proximately from the negligence of Chevron, that it did not result from the contributory negligence of Mr. Cole, and that the total amount of damages was $67,500.00.

Two, on September 1, 1967, pursuant to contract C-773, dated November 24, 1967, Chevron Chemical Company, whom I will refer to merely as Chevron, [3] and Mechanical Contracting Engineers, Incorporated, agreed that Mechanical Contracting would do certain work on the premises of Chevron.

Three, one of the conditions of this contract was "5.1, General Liability: Contractor shall indemnify and hold company harmless from and against any and all loss, damage, injury, liability, and claims thereof for injuries to or death of persons and all loss or damage to property of others, resulting directly or indirectly from contractor's performance of his contract."

And, of course, the remainder of the contract is in evidence.

Four, on February 16, 1968, at the time that Mr. Cole alleges that he was injured, Mechanical was engaged

on Chevron's premises in the performance of contract C-773, and Mr. Cole was working for Mechanical on Chevron's premises. He was then working under the control and direction and supervision of Mechanical, which was an independent contractor.

Five, thereafter on November 12, 1968, Mr. Cole filed suit against Chevron. He served the plaintiff's complaint and summons.

[4] Six, on November 15, 1968, Chevron tendered the defense of this action to which Mechanical and its insurer, Liberty Mutual, had asked for indemnities alleging the applicability of 5.1 and the other provisions of the contract.

Seven, Mechanical in turn on November 22, 1968, tendered the defense of indemnity to Chevron.

Eight, thereafter both Mechanical and Liberty Mutual declined to offer indemnity or to undertake the defense, and Chevron was then compelled to defend itself in this action.

Nine, that as a result of the necessity for defense, Chevron incurred $6,195.00 in attorney's fees and attorney's costs. The amount was reasonably incurred.

Ten, the trial of the plaintiff's case against Chevron was severed from Chevron's indemnity against Mechanical and Liberty Mutual. Neither Chevron nor Mechanical and Liberty Mutual requested a jury trial of this third party complaint, although the Court inquired whether they desired a jury trial of the third party complaint and the defense thereto, consequently to avoid confusing the jury. When the parties indicated

they preferred this action to be [5] tried through the Court, the Court did not permit Mechanical or Liberty Mutual to participate in the trial of the Cole case, and Liberty Mutual and Mechanical were not permitted through counsel to make objections to evidence, cross examine witnesses, present additional evidence or otherwise participate in the trial.

Eleven, third party defendants were denied the right to have Mr. Franklin present in the trial because of the possibilities he would be called as a witness and because he was not a representative of one of the parties present during the Cole trial.

Third party defendants were refused permission and indeed were advised that they could properly have counsel present in the courtroom to hear and observe what went on, they were advised that such counsel would not be permitted to participate actively in the trial.

All right, now, I am going to state generally a few of my legal observations and reserve my final conclusions thereon.

I suppose that in fairness to the parties I ought to give a little discursive treatment of this [6] case. My conclusions will not in any way be clear unless I state the premises on which they are based.

I think the evidence from which the jury found liability, i.e., negligence on the part of Chevron was sketchy at best. I have some doubt that were I the

trier of fact I would have found such negligence without in any way, however, prejudicing the new trial motion, I will say that I think at this time there was evidence from which the jury might have concluded what they did and that the evidence is not so sketchy that I ought to substitute my judgment for theirs.

Put another way, I think the verdict is likely not in accordance with what I perceived to be the preponderance of the evidence but not so remote that no reasonable man could reach that conclusion.

Well, obviously, I start with somewhat mixed motives about the verdict. I will try to make those explicit. But if we accept the verdict as it is, then there can be no doubt that the jury did find that Chevron was negligent.

[7] Now, there are only a limited number of kinds of negligence that Chevron could have been guilty of. I suppose we are trying to be exhaustive, these would include failure to clean the pipes thoroughly before they were cut, failure to clean the area thoroughly before it was worked on, and failure of the firewatch to clean up the spill after it happened. I don't know of any other alleged negligence really that was possibly embraced in the testimony on the main demand, and I don't know of any that was referred to in the third-party complaint, but if Chevron's negligence was any one or all of these, it seems to me that there must have been some act by Mechanical that directly or indirectly contributed to the injury.

If Chevron's negligence was failure to clean the pipes properly, then undoubtedly the time when something spilled was when it was cut by a welder for Mechanical. And if that be so, then that welder knew very well whether the firewatch cleaned up because it was the firewatcher's duty to say, stop work and clean, so he knew then and there the firewatch didn't clean it and then and there knew the firewatch [8] didn't see it. I take it he could not resolve himself completely from responsibility by shrugging his shoulders and saying, oh, well, he didn't notice it, ha, ha, and go about his work.

The second possibility is that Chevron didn't clean the area completely, and there is some testimony by Mr. Cole today that there was a lot of grease around everywhere.

Mr. Rippe testified the area was pretty clean, but let's assume that it was not sufficiently clean. Mechanical had been working there for several days. I think if the area was greasy and hazardous, even if the hazard was, as Mr. Cole's testimony today indicates, present only when this catwalk was removed, Mechanical had some duty to notice what was going on, and I don't think it can be said that it was the firewatcher's responsibility to peer under a catwalk or certainly not his sole responsibility. Taken from a standpoint most favorable to Mechanical, Mr. Cole's testimony would lead to the belief that there was a pool, a gallon of oil under the catwalk, not visible until the catwalk was removed. But who removed the catwalk? [9] Mechanical. Who was in the position to see it first? Per-

haps not Mr. Cole but certainly Mr. Walters, because it was on his side of the pipe.

And the third possibility we have already mentioned of negligence is that of the firewatcher's failure to clean, failure to clean either a spill or greasy condition that pre-existed Mechanical's entrance on the scene or one that occurred subsequently. And, as I have indicated, I think in either event Mechanical's performance of its operations under the contract likely contributed directly or indirectly to the events on which their suit is based.

I think the real problem, of course, that counsel trying the case today have is that they, perhaps even more than the Court, feel, well, there wasn't any evidence really that there was any oil there and, therefore, the jury should not have held anybody liable. But that's what the jury did. And you gentlemen had a chance to try your case and your claim to that same jury and have them make whatever findings they chose to make, consistent, inconsistent, or otherwise.

We all know that if judges and juries always decided cases exactly the same way, we would have no [10] need for both of them or we could dispense with one or the other. The only reason we have juries is they do decide cases differently from judges, and we have certain rules that govern their deviance. If they deviate so much, we can say, it's inflamed by passion, throw it out, start all over, it differs so much no reasonable man could do that, throw it out and start all over, there isn't enough evidence to go to the jury to

give a judgment that notwithstanding the verdict, don't even give a new trial. These are the perimeters of the limits that have to be set to the jury sometimes, but within those limits juries do deviate from what judges think, and obviously they deviate from what lawyers say in argument, they don't concur.

Now, I will reserve final conclusion after further study as to what judgment, if any, ought to be entered based on these findings.

If you gentlemen are moved by my remarks to cite me something that you think I have grossly overlooked, why, whether I have overlooked without being gross about it, why, I will read it.

I have not gone back and reread everything in the case, but I have read rather carefully, and [11] more than once, both the Chevron brief and the Mechanical brief filed with respect to the hearing today.

Anything further at this time, gentlemen?

MR. MELANCON:
No, your Honor.

MR. BAUS:
No, your Honor.

THE COURT:
Okay.
Thank you very much, gentlemen.

MR. BAUS:

If the Court pleases, apparently to the degree that I guess we feel you are inviting further briefs I think—

THE COURT:

You can have this off the record.

MR. BAUS:

Off the record.

(Whereupon, a discussion was had of the record, after which time the following proceedings were had:)

THE COURT:

Court will stand at recess.

(Whereupon, court adjourned.)

APPENDIX VII

Filed: Oct. 8, 1971

IN THE
DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
NUMBER 68-1943
SECTION C

WILLIAM F. COLE,
Plaintiff,

versus

CHEVRON CHEMICAL COMPANY -
ORONITE DIVISION,
Defendant.

OPINION WITH RESPECT TO INDEMNITY ISSUES

RUBIN, District Judge:

This diversity case requires a review of Louisiana law to determine the effect to be given a contractual indemnity agreement.

Mechanical contracted with Chevron to do welding and cutting work in connection with the construction of an addition to Chevron's plant. Cole, a Mechanical employee, was injured on the job. Precluded from su-

ing Mechanical in tort by the Louisiana Workmen's Compensation Law, Cole sued Chevron. Chevron then filed a third party complaint against Mechanical.

In a trial to a jury, Cole prevailed against Chevron and the jury awarded him $67,500. This verdict is now under attack by post trial motions. Chevron and Mechanical had, however, agreed to submit their litigation to the court.

I. THE CONTRACT AND THE VERDICT

Chevron's rights with regard to Mechanical are fixed by their contract. This provides in part:

> 5.1 General Liability: CONTRACTOR shall indemnify and save COMPANY harmless from and against any and all loss, damage, injury, liability and claims thereof for injuries to or death of persons, and all loss or damage to property of others, resulting directly or indirectly from CONTRACTOR'S performance of this contract.

Cole's testimony was that he hurt himself when he slipped in a pool of oil, comprised of both "old" and "new" oil. This testimony was confirmed by his fellow worker, Walters. They both testified that Cole and Walters were carrying an iron grating; Cole, following Walters, stepped over a pipe, and Cole slipped in a pool of oil. These two witnesses, whose version was obviously accepted by the jury, offered the only evi-

dence concerning the cause of the incident and the kind of oil allegedly involved.

The evidence indicated that the "new" oil spilled when Mechanical's welders cut pipes containing this oil, but the "old" oil was presumably left from Chevron's earlier operations. Cole's theory, which the jury accepted, was that it was Chevron's duty to clean oil from the work area before Mechanical's work began, and the duty of Chevron's firewatcher to clean spilled new oil. The jury found that Chevron was negligent and Cole was not contributorily negligent.

Since the jury apparently accepted Cole's account, it must have concluded that some of the oil was "new" oil, spilled during Mechanical's operations. If this was so, it was the duty of Mechanical's personnel to call the spill to Chevron's attention.

Cole was working under Mechanical's direction and supervision. Mechanical had an express contractual obligation to keep "a competent man in the immediate vicinity of the work to receive communications from [Chevron] and to supervise the work." The facts the jury accepted must be based on the theory that the accident was caused "directly or indirectly" by Mechanical as well as by Chevron's negligence.

The jury verdict establishes that Chevron was at fault, and Chevron is bound by that finding. But the conclusion that negligence on Chevron's part was *a* proximate cause of Cole's injury does not exclude

the possibility that the injury resulted at least indirectly from Mechanical's performance of the contract.

Under the agreement, "negligence" or "fault" on Mechanical's part is not the sole condition that creates a duty to indemnify. Indemnity is due whenever Chevron sustains loss or damage resulting *directly or indirectly* from Mechanical's *performance of its contract*, whether or not Mechanical has in fact been "negligent."

II. INTERPRETATION OF THE CONTRACT

Since Chevron and Mechanical had a contractual indemnity agreement, the cases dealing with the obligation of implied indemnity in the absence of contract are inapplicable. Compare Humble Oil and Refining Co. v. Naquin, 5 Cir. 1969, 414 F.2d 912; Halliburton Company v. Norton Drilling Company, 5 Cir. 1962, 302 F.2d 431; General Electric Co. v. Cuban American Nickel Co., 5 Cir. 1958, 396 F.2d 89; United Gas Corp. v. Guillory, 5 Cir. 1953, 206 F.2d 49.

It was not claimed in the pleadings or the pre-trial order that the written indemnity agreement did not accurately reflect the understandings between Chevron and Mechanical, or that it was ambiguous, and its interpretation must therefore be determined as a matter of law, based on the language used therein by the parties. Mills v. Fidelity & Casualty Co., 226 F.Supp. 786, at 790 aff'd per curiam, 5 Cir. 1964, 338 F.2d 341; and Arnold v. Stupp. Corp., La. App. 1967, 205 So.2d 797 at 804.

Louisiana courts, whose opinions we are obliged to follow in this diversity case, have held that a contract of indemnity will not be construed to indemnify against a loss resulting *solely* from the indemnitee's own negligent acts unless that intention is expressed in unequivocal terms. Arnold v. Stupp Corp., La.App. 1968, 205 So.2d 797. Compare Jennings v. Ralston Purina Co., La. App. 1967, 201 So.2d 168, which the court distinguished in *Arnold*. See also Gorsalitz v. Olin Mathieson Chemical Corp., 5 Cir. 1970, 429 F.2d 1033, 1049, (negligence solely that of company), and Dickerson v. Continental Oil Co., 5 Cir. ____ F.2d ____ (Sept. 28, 1971, # 30631); compare the discussion by this court in Despaux v. California Co., E.D. La. 1968, 286 F.Supp. 558. Louisiana, like most states, has indicated a tendency to construe indemnity agreements narrowly, particularly where, as here, they were drafted by the indemnitee. *Jennings, supra*, at 175; *Arnold, supra*, at 799.

But the mandate that an agreement is to be read narrowly does not mean it is to be disregarded. The agreement must be given effect according to the intention of the parties, for the contract is the law between them. Louisiana Civil Code Art. 1901.

III. LOUISIANA LAW IN ABSENCE OF CONTRACTUAL INDEMNITY — "PURE" TORT SITUATIONS

In order to ascertain what the parties intended by their agreement, it will be helpful to compare their respective rights and duties in the absence of a con-

tractual indemnity agreement under the basic principles of Louisiana tort and quasi-contract law.

The injured person may recover from an alleged tortfeasor if he proves that his injury resulted from the tortfeasor's negligence in whole or in part. If the negligence of some other person, not joined as a defendant, is shown to be the sole cause of the injury, then the plaintiff cannot recover. But in the case of joint tortfeasors, either of them may be case in judgment for the full damages; hence a defendant who is obliged to pay for the full amount of the injuries resulting from his fault concurrent with the negligence of a third person may claim *contribution* from the third person, and recover a virile portion of the damage to the plaintiff. La. C.C. 2103, 2104, 2324; 2 Williston on Contracts § 345 (3d ed. 1959); Note, Contribution Among Joint Tortfeasors, 43 Tul. L. Rev. 153 (1968).

Like other states, Louisiana defines the doctrine of contribution as the right of a tortfeasor cast in judgment for an injury only partly his fault to recoup part of his loss from the other person who is also at fault.

Where, however, the defendant is held vicariously liable and his fault is not actual but only technical or constructive, he has a quasi-contractual claim for *indemnity* from the third person whose *sole fault* actually caused the injury. Appalachian Corp. v. Brooklyn Cooperage Co., 1922, 151 La. 41, 91 So. 539; Marquette Cas. Co. v. Brown, 1958, 235 La. 245, 103 So.2d 269, 273; Northwestern Mutual Fire Ass'n v. Allain, 1954, 226 La. 788, 77 So.2d 395, 399; Accord, Humble

Oil, *supra* at 914; Halliburton, *supra* at 437; General Electric Co., *supra* at 90; United Gas, *supra* at 53. Implied indemnity then is the right to recoup a loss in full because someone else has in fact caused the loss. The costs of defense of the main demand and of pursuing the claim against the third person, however, are not embraced either in indemnity or contribution.

Prior to 1960, the defendant in the principal demand, if sued alone, could not enforce contribution or indemnity in the principal action. If case resulted in judgment against him, he was required to file a separate action against the alleged joint tortfeasor. See Kahn v. Urania Lumber Co., La. App. 1958, 103 So.2d 476; La. C.C. art. 2103 as amended by La. Acts 1960, No. 30, § 1. To avoid this multiplicity of actions, additional legal expense, possible inconsistent results, and other hardships, Art. 2103 of the Louisiana Civil Code was amended to permit the defendant to bring a third party demand against the alleged co-debtor. This change in Louisiana's rules had both procedural and substantive aspects. See LSA-CCP Arts. 1111 et seq; LSA-CC Art. 2103, and explanatory notes thereto.

IV. LOUISIANA LAW WHERE THE PERSON AGAINST WHOM INDEMNITY OR CONTRIBUTION IS SOUGHT IS THE WORKMEN'S COMPENSATION EMPLOYER

Where the plaintiff in a tort action is an employee of a contractor doing business with a principal, the liability of the statutory employer is limited to work-

men's compensation by the Louisiana Workmen's Compensation Act whether or not the injury results from the employer's negligence. LSA-R.S. 23:1032. See generally, comment, The Right of a Third Party to Contribution or Indemnity from a La. Workmen's Comp. Employer, 38 Tul. L. Rev. 536 (1964). This has been interpreted to preclude a claim by the principal for contribution by the contractor (the statutory employer) when the contractor's fault is a joint cause "or is even the predominant cause of the damages." Smith v. Kelly Labor Service, La. App. 1970, 239 So.2d 685; McLaughlin v. Braswell, La. App. 1968, 207 So.2d 158; Hebert v. Blankenship, La. App. 1966, 187 So.2d 798. Nor is it certain that quasi contractual indemnity could be obtained where the principal's fault is merely vicarious. See *Humble, supra* at 914; *Halliburton, supra* at 434; *General Electric, supra* at 100-102, cf. *Hebert, supra* at 803.

V. REDISTRIBUTION OF RISKS BY CONTRACT

In the usual tort situation, there is no prior relationship between the potential tort defendant and his prospective indemnitor. Hence they have no opportunity to alter the distribution of risks. But where a principal employs a contractor, the contract between them may embrace not only the work to be done and the price to be paid, but also the risk of tort claims that may arise. See 2 Williston on Contracts, # 345 (3d ed. 1959), 1 Harper and James, The Law of Torts, # 10.2, at 723 (1956). By contract either party may relieve the other from the duty of contribution or from the duty of indemnity. And either may undertake a duty to con-

tribute or indemnify where none would otherwise exist. In Louisiana the validity of an agreement by an employer to indemnify against tort claims by his own employees has been recognized even though the Workmen's Compensation Act would provide an absolute shield in the absence of such a contract. See Hebert v. Blankenship, La. App. 1966, 187 So.2d 798.

Paragraph 5.1 of the contract between Chevron and Mechanical then is an attempt to allocate the risk of certain kinds of loss that may arise during the course of its performance. Such a loss might arise when a third person, unrelated to either party is injured; when an employee of Chevron is injured; when an employee of Mechanical is injured and sues Chevron; or when property damage is sustained by Chevron.

As applied to all of these situations, and particularly the situation where an injured person sues Chevron, this provision must have been intended to alter in some way the rules governing risk distribution that would otherwise be applied. So our effort must be to determine in what way the parties intended to alter these rules.

Contractual provisions containing similar terms have been involved in three cases, two decided by Louisiana's Appellate Courts, and one decided by the Fifth Circuit Court of Appeals, applying Louisiana law. Gorsalitz v. Olin Mathieson Chemical Corp., 5 Cir. 1970, 429 F.2d 1033; Arnold v. Stupp Corp., La. App. 1967, 205 So.2d 797; Jennings v. Ralston Purina Co., La. App. 1967, 201 So.2d 168. Compare, Dickerson v. Continental

Oil Co., 5 Cir. ____ F.2d ____, (Sept. 28, 1971, No. 30631). The words used in the contract involved here are set forth below, and beside them are the provisions interpreted in the other three cases.

Cole

"Contractor shall indemnify and save Company harmless from and against *any and all loss* ... resulting directly or indirectly from Contractor's performance of this contract." (Emphasis supplied)

Jennings

"Contractor shall protect, indemnify and hold harmless Company *from any loss ... directly or indirectly arising or growing out of the performance* of this Contract. ..." (Emphasis supplied) 201 So.2d 174

Arnold

[Contractor] "agrees to defend, indemnify and save harmless [Company] against any and all liability ... *arising out of, caused by, or resulting from* ... any business transaction with or work done for [Company] by [Contractors]." (Emphasis supplied) 205 So.2d at 798-99.

Gorsalitz

"Contractor shall indemnify Owner against: (a) any claim, demand, suit, loss or liability ... *arising out of work performed hereunder* ... occasioned by acts or

omissions, whether or not negligent, of Contractor's officers, employees, agents or subcontractors." (Emphasis supplied) 429 F.2d at 1048-1049.

In *Jennings, supra* an employee of a building contractor sued the principal in tort for injuries he received as a result of negligence by the principal's employees. The principal impleaded the contractor as a third party defendant asserting the indemnity provision of their contract. Not only did the indemnity provision contain the general language that the contractor would "hold company harmless ... for any ... injury sustained by any person resulting from the performance of this contract," but it went on to require that the contractor obtain liability insurance to protect the company from claims by "contractor's workmen." 201 So.2d at 174. Finding that the principal was solely negligent, the court then required indemnification by the contractor-employer, holding that the phrase "any . . . injury arising out of the performance of the contract" included all injuries, whether or not the damage resulted from the principal's negligence. As a result of this decision, it is established that indemnification for one's own negligence is available in Louisiana, even though words specifically assuming liability for the party's own "negligence" or "fault" are absent from the contract.

Six months after *Jennings*, another Louisiana Court of Appeals decided *Arnold, supra* under substantially similar facts. Again the principal was solely negligent, and the contract provided indemnification for "any and all liability ... caused by or resulting from any

business transaction or work done for [the principal] by the [contractor]." 205 So.2d at 797. The court held that this language was not sufficiently clear and unequivocal to shift the risk of liability for the principal's sole negligence. *Jennings* was distinguished on the basis of its contractual provision requiring the contractor to obtain insurance to protect the principal against claims by the contractor's workmen. 205 So.2d at 803.

In *Gorsalitz, supra,* as here, the injured person was an employee of the defendant in the third party complaint from whom indemnification was being sought. The jury there had found the principal defendant negligent in 15 different respects. Hence it was clear that its liability was predicated directly on its own negligence. The court considered that the indemnity agreement did not shift liability for this kind of negligence to the indemnitor because a reasonable construction of the contract was that the contractor intended to indemnify the principal *only* for negligent acts of the contractor's employees, 429 F.2d at 1049. After comparing the indemnity agreement in *Jennings* with the one involved in *Gorsalitz*, the Court of Appeals found that the agreement in *Jennings* "demonstrates a clear and unequivocal intent . . . as compared to the contrary intent in this case, to indemnify the indemnitee against his own negligence." 429 F.2d at 1050.

VI. APPLYING THE CONTRACT TO THE COLE CLAIM

All of these cases then involve the question of indemnity for a tort caused by the indemnitee's sole fault.

And all of them discuss the contract provisions in terms of "fault" or "negligence" whether or not these words are employed. As indicated by the discussion in Part I, Chevron here seeks indemnity for damages that I conclude were caused "directly or indirectly" by Mechanical. If it is necessary to go further and decide whether this implies joint fault, then I conclude that Mechanical was jointly negligent.

Pretermitting the question whether the contract between Chevron and Mechanical affords indemnity for injuries sustained as a result of Chevron's sole negligence, the only remaining scope that could be afforded it would be: (1) To provide *indemnity* for Chevron when an accident was caused in part by Mechanical; (2) To provide *contribution* for Chevron when an accident was caused by both jointly; (3) To provide costs of defense in both of these situations and in the situation where Chevron is exonerated. Since the contract speaks in terms of *indemnity*, not contribution, it appears not to require merely a division of risk. Since this contract, unlike insurance policies, does not contain a separate obligation to defend, it appears not to contemplate merely the costs of litigation. Should Chevron's motion be granted and its Section 6, LSA-R.S. 23:1061, defense be upheld, however, the language would appear to embrace costs of defense.

As to the one remaining situation, which is here presented directly, a judgment predicated directly or indirectly on Mechanical's acts, it appears that the language of the indemnity agreement must have been intended to afford protection to Chevron, else the agree-

ment would cover nothing save possibly the costs of defense. Obviously if the agreement is broad enough to cover Chevron's sole fault, then it reaches the present case as well.

The parties have stipulated that the damage suffered by Chevron amounted to $6,915.00 in addition to any sum for which it may be obligated to Cole.

For these reasons the claim for indemnity by Chevron against Mechanical will be granted. Counsel for Chevron will prepare an appropriate form or order, to remain interlocutory until the motions still pending on the main demand are disposed of.

/s/ ALVIN B. RUBIN
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
October 7, 1971

APPENDIX VIII

Filed: Dec. 21, 1971

IN THE
DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
NUMBER 68-1943
SECTION C

WILLIAM F. COLE,
Plaintiff,

versus

CHEVRON CHEMICAL COMPANY -
ORONITE DIVISION,
Defendant.

OPINION ON JUDGMENT NOTWITHSTANDING THE VERDICT

RUBIN, District Judge:

The motion to have the judgment entered on the jury's verdict set aside and to have judgment entered in accordance with the defendant's motion for a directed verdict, commonly called a motion for judgment notwithstanding the verdict, raises a question that has proved particularly troublesome to this court with respect the scope of Section 6 of the Louisiana Workmen's Compensation Law. The Louisiana Work-

men's Compensation Law provides the exclusive remedy of any employee subject to its provisions against all persons who are liable under the law. LSA-R.S. 23:1032. Section 6, LSA-R.S. 23:1061 makes the compensation law applicable, "where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade, business or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal. . . ."

The question of the applicability of Section 6 to the claim of Mr. Cole was first presented on motion for summary judgment, which was granted in this court. As set forth in the opinion of the Court of Appeals, reversing that judgment, Cole v. Chevron Chemical Company, 5 Cir. 1970, 427 F.2d 390, 392,

> "Chevchem hired MCEI to do general welding work at the Oronite Division Plant. Cole, an employee of MCEI, was injured while working in the course of his employment as a welder at the plant. He brought this action against Chevchem for the damages that allegedly resulted from the latter's negligence. Chevchem responded that Cole's exclusive remedy for his injury was to be found under the Louisiana workmen's compensation law since Chevchem was Cole's 'statutory employer,' and a workman cannot maintain a tort action under Louisiana law against his 'statutory employer.'"

In a previous case, involving a similar situation, the court had submitted the Section 6 issue to the jury, phrased as follows: "Was the work for which Shell contracted with Liberty Welding Company part of Shell's regular trade, business or occupation?" The Fifth Circuit Court of Appeals had held just a few weeks before, in Arnold v. Shell Oil Company, 5 Cir. 1969, 419 F.2d 43,

> "that the test for determining whether an activity is part of an employer's trade or business for the purposes of the Louisiana Workmen's Compensation Statute is whether the particular activity is essential to the business. The fact that the employer or the industry as a whole always contracts out the activity is not controlling. This business test clearly carries out the purposes of section 23:1061 — to prevent subversion of the workmen's compensation laws by an employer contracting out part of his business. If the test under this statute were whether the employer had any employees engaged in similar functions, the employer could easily subvert the statute by contracting out all of the various parts of his business. For example, if the employer were an integrated oil company, he could contract out all his drilling activity, pipeline construction and maintenance, refining, and petrochemical processing and virtually eliminate wokmen's compensation coverage leaving the workers to collect from a possibly insolvent contractor. Under the essential-to-the-business test, however, all these activities

> would be covered and the purpose of the statute to interpose the solvecy of the oil company between the worker and the contractor would be carried out." Id. at 50.

The *Arnold* court therefore held that the district court erred in refusing to grant Shell's motion for judgment notwithstanding the verdict.

The panel that considered Cole concluded "that this case is of the character that does not justify oral argument," and reversed the summary judgment because "material factual issues remain to be tried. ..." The court considered that the "picture of Chevron's operations at its Oronite Division Plant is not clear." 427 F.2d at 392-394.

There is a different criterion to be applied between considering whether to grant a motion for summary judgment and whether to grant a directed verdict or motion for judgment n.o.v. *Cole* reaffirms the legal standard applied in *Arnold*. It is not based on a different view of the law but on the thesis that further information might have been developed at the trial concerning "whether the particular activity is so related to the principal employer's conduct of his trade, business, or occupation that it should be considered as an essential part thereof." 427 F.2d at 394.

Both decisions stress "that the workmen's compensation law should be liberally construed *with a view to coverage*, regardless of whether the contractor's employee or the principal is the party asserting coverage. *E.g.*, Arnold v. Shell Oil Company, 5 Cir. 1969,

419 F.2d 43, 47; Isthmian S.S. Co. of Delaware v. Olivieri, 5 Cir. 1953, 202 F.2d 492, 494; *see* Thibodaux v. Sun Oil Co., 40 So.2d 761, 766 (La.Ct.App. 1949), aff'd 218 La. 453, 49 So.2d 852 (1950)." (Emphasis supplied.) 427 F.2d at 393.

In the present case, Chevchem was its own general contractor in demolishing certain old facilities and erecting new ones. MCEI was but a subcontractor. Hence, as in Owen v. Kaiser Aluminum and Chemical Corp., 5 Cir. 1969, 417 F.2d 303, it is clear that Section 6 applies. The evidence shows that, differently from the sugar refiner considered in Moak v. Link-Belt Company, 4 Cir. 1970, 229 So.2d 395, 412, Chevchem could not have continued to operate its business indefinitely without the new process.

Mr. Rippe testified, without contradiction, that Chevchem did this same kind of work continuously, as a matter of course. Mr. Estopinnal testified that this type of revision of production methods was essential to the continued welfare of the plant and had been done almost continuously since the plant was constructed. He further testified that the Belle Chasse plant's expansion had been continuous, dependent only on economic activity. This testimony was uncontradicted and entirely credible.

The plant covers 35 acres (on a 70 acre tract) and includes innumerable pipes that carry products and steam from one point to another for processing and, ultimately, for packaging. More than 100 tanks have been added in Mr. Estoppinal's 26 years with the company. The company has 35 full time employees en-

gaged in maintenance work including welders and pipefitters. It is a "matter of choice" whether a particular job is done by the company's staff or by an outside contractor. Some construction work is done by the company's staff when the plant's maintenance workload permits.

The plant has been enlarged from a $1,000,000 original plant to one having a value of $25,000,000, primarily by Chevchem itself. Chevchem's engineers prepare blueprints, then Chevron decides either to do the expansion work itself or to contract out all or part of it. In the present case, it was proceeding as if it were general contractor, and was subcontracting separate parts of the job.

The Louisiana decisions are difficult to reconcile completely.[1] But they appear to follow the pattern indicated by *Arnold*. The decision of a Louisiana appellate court in Gray v. Louisiana Power and Light Company, 4 Cir. 1971, 247 So.2d 137, indicates that *Arnold* and *Cole* correctly state the legal principles applicable in construing Section 6. There an employee of a contractor for a utility company was constructing foundations for towers that were to support electric transmission lines. In the employee's suit against the

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[1]Ball v. Kaiser Aluminum and Chemical Corp., Orleans Cir. 1959, 112 So.2d 741, 745, where it was held that construction of a new plant by a firm employed as general contractor was not part of the trade or business of the principal. *Cf.* Richard v. National Surety Corp., La. App. 1958, 99 So.2d 831, 832. (Where an employee or contractor constructing major power line improvements was, for the purposes of workmen's compensation, an employee of the city that operated the power plant.)

utility company the district court's summary judgment upholding the Section 6 defense was affirmed. The Court indicated that the reasons it did so were: (a) the work in question was an integral and a necessary part of the regular trade, business and occupation of the principal and (b) "the charter of LP & L specifically authorized it to have done this construction work if it so desired. The work being done was in furtherance of its business of producing and transmitting electric power to the public, as evidenced by the accompanying affidavit. Therefore the injured appellant's sole remedy is in compensation and the motion for summary judgment is well founded." 247 So.2d at 141. The identical factors are present here.

In the present case, the issue was submitted to the jury under instructions that were not objected to in any significant way by either party. Its verdict should not be disturbed if there was any substantial evidence to support it. There is no "substantial evidence which would support a verdict" when "the evidence and all legitimate inferences therefrom [are viewed] in the light most favorable to the party against whom [the] motion" is made. Baron Tube Co. v. Transport Insurance Co., 5 Cir. 1966, 365 F.2d 858, 861. "Thus, the motion for judgment n.o.v. may be granted only when, without weighing the evidence, there can be but one reasonable conclusion as to the proper judgment," 5A Moore's Federal Practice § 50.07, at 2356, and the motion is proper when there is "a complete absence of any evidence to warrant submission to the jury." Cities Service Oil Co. v. Launey, 5 Cir. 1968, 403 F.2d 537, 539. See Arnold v. Shell Oil Co., 5 Cir., 419 F.2d 43, where in reversing the district court's denial of a judg-

ment n.o.v. in a similar situation, the court found the plaintiff to be a statutory employee "as a matter of law," 419 F.2d at 46.

In this case there was no substantial evidence to support the finding that the work was not part of Chevchem's principal trade or business, even when all the record is viewed in the light most favorable to Mr. Cole. Taking all the testimony and all reasonable inferences from it, in the light most favorable to Mr. Cole, it clearly appears that Chevchem was his statutory employer.

For these reasons the motion for judgment notwithstanding the verdict is granted. Because of the result thus reached, it is unnecessary to consider the other motions.

/s/ ALVIN B. RUBIN
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
December 20, 1971.

APPENDIX IX

Filed: Jan. 4, 1972

In the District Court of the United States
Eastern District of Louisiana
New Orleans Division

Civil Action
Number 68-1943
Section C

William F. Cole,
Plaintiff,

versus

Chevron Chemical Company-Oronite Division,
Defendant.

JUDGMENT

The complaint of plaintiff, Mr. William F. Cole, asserted against Chevron Chemical Company and the third-party complaint of Chevron Chemical Company asserted against Mechanical Contracting Engineers, Inc. and Liberty Mutual Insurance Company, as filed in the above-entitled and numbered Civil Action, were tried before the Court and a jury, by agreement and stipulation of the parties, on July 12, 13, 14 and 30, 1971, and the jury after having heard the evidence and testimony answered interrogatories, as follows:

CHARGE OF THE COURT AND VERDICT

1- Was the work for which Chevron contracted with Mechanical Contracting Engineers, Inc., part of Chevron's regular trade, business or occupation?
Yes ____ No X

SPECIAL VERDICT

1- Was Mr. Cole injured on February 16, 1968?
Yes ____ No X

2- If your answer is "Yes", was that injury proximately caused by negligence on the part of Chevron?
Yes X No ____

3- If you answered question No. 1 "Yes" and question No. 2 "Yes", then was Mr. Cole negligent?
Yes ____ No X

4- If you answered question No. 3 "Yes", was the contributory negligence a proximate cause of his injury?
Yes ____ No ____

5- If you answered questions No. 1 and No. 2 "Yes", and either question No. 3 or No. 4 "No", what amount of damages is due Mr. Cole?
$67,500.00
(Total Amount of Damages)

and thereafter, the Court made findings of fact on July 30, 1971 and conclusions of law on October 7, 1971, in connection with the claims of Chevron Chemical Company asserted against Mechanical Contracting Engineers, Inc. and Liberty Mutual Insurance Company, which now form part of the record. Subsequently, post-trial motions for judgment in accordance with motions for directed verdict, alternatively for judgment non obstante veredicto and new trial were filed by Chevron Chemical Company and a motion for new trial limited to argument of legal issues was filed jointly by Mechanical Contracting Engineers, Inc. and Liberty Mutual Insurance Company, having been heard through notice, and considering the entire record, evidence, stipulations, testimony, and argument, I rendered and filed my opinion on December 20, 1971;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Chevron Chemical Company, in accordance with the defendant's motion for a directed verdict and the complaint and cause of action asserted by Mr. William F. Cole against Chevron Chemical Company be and they are hereby dismissed; and, in the event the motion for a directed verdict had been denied, then I would have granted the motion for new trial by Chevron Chemical Company;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion for new trial limited to argument of legal issues by Mechanical Contracting Engineers, Inc. and Liberty Mutual Insurance Company, be and it is hereby denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Chevron Chemical Company have judgment against and recover from Mechanical Contracting Engineers, Inc. and Liberty Mutual Insurance Company, jointly, severally and in solido, the sum of SIX THOUSAND ONE HUNDRED NINETY-FIVE AND NO/100 ($6,195.00) DOLLARS, for legal fees and costs incurred through and including July 30, 1971 in the defense of plaintiff's complaint, with interest thereon at the rate of 6% per annum from November 30, 1971 until paid, and costs in accordance with the provisions of the Federal Rules of Civil Procedure, Rule 54, without prejudice to the right of Chevron Chemical Company to subsequently prosecute any claim it may have for additional legal fees and costs incurred in the future, arising out of the defense of plaintiff's demands.

New Orleans, Louisiana, January 4, 1972.

/s/ ALVIN B. RUBIN
DISTRICT JUDGE

Respectfully submitted:

/s/ LLOYD C. MELANCON
MESSRS. McLOUGHLIN, BARRANGER, PROVOSTY AND MELANCON
Counsel for Chevron Chemical Company
720 Hibernia Bank Building
New Orleans 70112
523-5116 Our LM0172

APPENDIX X

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1025

WILLIAM F. COLE,
Plaintiff-Appellant,
versus

CHEVRON CHEMICAL COMPANY - ORONITE DIVISION,
Defendant-Appellee,

MECHANICAL CONTRACTING ENGINEERS, INC., and LIBERTY MUTUAL INSURANCE COMPANY,
Third Party Defendants-
Appellees-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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(April 23, 1973)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

DYER, Circuit Judge: Two questions are presented on appeal in this Louisiana-based diversity case:

(1) whether the work that Mechanical Contracting Engineers, Inc., performed for Chevron at its plant in Belle Chasse, Louisiana, was, as a matter of law, part of Chevron's "trade, business, or occupation" for the purposes of establishing coverage under § 6 of the Louisiana Workmen's Compensation Statute, La. Rev. Stat. Ann. § 23:1061;[1] and (2) whether in Louisiana, an indemnity agreement that does not expressly specify the indemnitor's intent to indemnify for the indemnitee's own negligence is enforceable where the damage is caused by the *concurrent* negligence of the indemnitee *and* indemnitor, rather than by the *sole* negligence of the indemnitee. We affirm in part and reverse in part.

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[1]La. Rev. Stat. § 23:1061 provides:

> Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.
>
> Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his defendant, and shall have a cause of action therefor.

Mechanical was hired by Chevron to do general welding and pipe fitting work at its Belle Chasse plant. The job primarily consisted of cutting and removing old pipes, valves, gratings, and other refinery paraphernalia to make way for construction of additional facilities and installation of new equipment. In February 1968 Cole, a welder employed by Mechanical for the Chevron job, was injured during the course of his employment at the Belle Chasse plant. He sued Chevron under the general negligence law of Louisiana for damages he sustained as a result of his slipping and falling in a puddle of oil while he was helping a fellow employee carry a heavy piece of steel grating. The puddle was comprised of both "old" and "new" oil; the new oil was spilled when Mechanical's welders cut pipes containing the oil, but the old oil had been left from Chevron's earlier operations.

Cole contended that Chevron was negligent in that it breached the duty it owed him as a Mechanical employee to remove old oil from the floor before Mechanical began working in the area and that Chevron's firewatcher breached his duty to clean up the spilled new oil. Chevron countered that it was Cole's "statutory employer" within the meaning of La. Rev. Stat. Ann. § 23:1061 and that therefore Cole's exclusive remedy for his injury was workmen's compensation since under Louisiana law a workman cannot maintain a tort action against his statutory employer. La. Rev. Stat. Ann. § 23:1032. In response to Cole's claim, Chevron also asserted a third-party complaint against Mechanical and its insurer, Liberty Mutual Insurance Company, on the basis of a written indemnity agreement

between Chevron and Mechanical for the work being performed by Mechanical when Cole was injured.

Prior to trial Chevron filed a motion for summary judgment supported by affidavits; the motion was granted and the suit dismissed. On appeal, this Court reversed that judgment and remanded the cause for trial on the merits because material factual issues remained to be tried. *Cole v. Chevron Chemical Co.*, 5 Cir. 1970, 427 F.2d 390. In so holding the Court pointed out that:

> In cases such as Arnold v. Shell Oil Company, 5 Cir., 1969, 419 F.2d 43, and Allen v. United States Fire Insurance Company, 222 So.2d 887 (La. Ct. App. 1969), the factual picture of the principal employer's business operations, and of the part the activity in issue played in those operations, was well defined. Here, on the other hand, the picture of Chevchem's operations at its Oronite Division Plant is not clear. That Chevchem is engaged in the production of petro-chemicals derived from hydrocarbons is not conclusive of the issue whether all types of welding work performed at its Oronite Division Plant — demolition and construction work, as well as "repair" and "maintenance" work — are part of the "regular operations" at the Plant. Further factual development is necessary....

427 F.2d at 394.

On remand, Cole's suit against Chevron was tried in two parts. The first day of testimony related only to the issue of whether Chevron was the statutory employer of Cole. This issue was submitted to the jury; it determined that the work for which Chevron contracted with Mechanical was not part of Chevron's "trade, business, or occupation." After the second phase of the trial was completed on the following day, a special verdict was rendered. The jury found that Cole was injured, that his injury was caused by the negligence of Chevron, that Cole was not contributorily negligent, and that he was entitled to damages of $67,500.

Subsequently, Chevron filed a motion for a judgment notwithstanding the verdict and alternatively for a new trial. The district court granted the motion for a judgment N.O.V. and conditionally granted a new trial, contingent on the judgment N.O.V. not being affirmed on appeal. In the meantime, Chevron's indemnity action against Mechanical was tried without a jury, and the district court held that Chevron was entitled to indemnification because Mechanical had been concurrently negligent in that it had a contractual obligation to keep "a competent man in the vicinity ... to supervise the work" and its personnel failed to call the spillage of new oil to the attention of Chevron's firewatcher. Reasoning that Cole's injuries were therefore caused "directly or indirectly" (the words of the indemnity agreement) by Mechanical, the court concluded that Mechanical was bound to indemnify Chevron for any damages that it might owe Cole as well as for its costs of defense, which were stipulated to be $6,915. This

appeal by Cole on the statutory employer question and by Mechanical on the indemnity issue ensued.

Was the Work Performed by Mechanical and Cole Part of Chevron's "Trade, Business, or Occupation"?

Section 6 of the Louisiana Workmen's Compensation Statute, La. Rev. Stat. Ann. § 23:1061, provides that any person (referred to as a principal) who contracts out work which is a part of his "trade, business, or occupation" is liable for workmen's compensation to any of the contractor's employees who are injured while engaged in such work to the same extent as if the contractor's injured employee were one of the principal's own employees. In other words, under certain circumstances, the principal is considered to be the statutory employer of the independent contractor's employees for the purpose of establishing coverage under the Workmen's Compensation Statute. The purpose of this provision is to prevent the principal from evading his workmen's compensation responsibility by interposing an independent contractor between himself and employees who are actually utilized in performing a part of the principal's "trade, business, or occupation." *Cole v. Chevron Chemical Co.*, 5 Cir. 1970, 427 F.2d 390, 392; *Arnold v. Shell Oil Co.*, 5 Cir. 1969, 419 F.2d 43, 46. Section 23:1061 benefits the employees of the contractor when the contractor is financially impoverished, because the principal may be held liable for their workmen's compensation. "On the other hand, when the contractor is able to fulfill his compensation responsibilities, the provision operates to limit his employees to the maximum benefits payable under

the Workmen's Compensation Statute, since the principal, as their 'statutory employer,' is, like the contractor, immunized from tort liability to the employees by the exclusive — remedy provision of that act. La. Rev. Stat. Ann. § 23:1032." *Cole v. Chevron Chemical Co., supra* at 392-93.

The standard for determining whether a given activity performed by an independent contractor is part of a principal's "trade, business, or occupation" is, to a degree, dependent upon the factual context of the case. The Louisiana courts in the early cases of *Seabury v. Arkansas Natural Gas Corp.*, La. App. 1930, 127 So. 25, and *Dandridge v. Fidelity & Casualty Co.*, La. App. 1939, 192 So. 887, applied a two-pronged test based on business necessity and employment of similar workers. However, keeping in mind the policy that workmen's compensation law should be liberally construed regardless of whether the employer or employee is the party asserting coverage, the Louisiana courts in *Turner v. Oliphant Oil Corp.*, La. App. 1940, 200 So. 513; *Thibodaux v. Sun Oil Co.*, La. App. 1949, 40 So.2d 761; *Doucet v. W.H.C., Inc.*, La. App. 1968, 212 So.2d 267; and *Allan v. United States Fire Insurance Co.*, La. App. 1969, 222 So.2d 887, retreated somewhat from this two-pronged test. In these cases the court held that the fact that the principal did not have any employees engaged in a similar activity was not controlling *where* the work contracted out was so necessary to the principal's operations that, if it were not performed by the independent contractor, the principal would have to hire workers of its own to perform the task.

In *Arnold v. Shell Oil Co., supra,* the Fifth Circuit was confronted by an analogous factual situation. An employee of an independent contractor was injured while repairing a Shell heater-treater, which is a device used to separate sand and salt water from freshly mined oil. Shell had no workers employed on this job and, in fact, had always contracted out its heater-treater maintenance work. It was undisputed, however, that the proper functioning of the heater-treater is necessary to the efficient operation of an integrated oil company, because the salt water and sand would corrode the pipeline if not removed before pumping the oil to the refinery. Based on these facts, the Court held that Shell was the injured employee's statutory employer as a matter of law, concluding that to determine if an activity is part of a principal's "trade, business, or occupation" for purposes of Louisiana's Workmen's Compensation Statute, the proper test is "whether the particular activity is essential to the business." In so holding, the Court relied heavily on the rationale of the latter line of Louisiana cases that under such circumstances, the "fact that the employer or industry as a whole contracts out the activity is not controlling." 419 F.2d at 50.

Likewise, the panel of this Court that originally considered the case *sub judice* when it was on appeal from the entry of summary judgment pointed out that similarly not controlling is the fact that the principal hires employees of his own to do work related to the activity being performed by the contractor's employees. "Instead, the decisive factors are the nature of the activity being contracted out, the nature of the principal employer's business, and the relationship between the

particular activity and the broader business operation." *Cole v. Chevron Chemical Co., supra* at 394. Although the employment of similar workers is not *controlling*, where a principal in fact acts as his own general contractor or has a number of his own employees *regularly* performing a task substantially similar to the activity which he contracts out, the principal thereby affords a definite indication that the work engaged in by the contractor's employees is part of his own trade or business. *See* La. Rev. Stat. Ann. § 23:1061, comment at 489-90; *cf. Lutz v. Long-Bell Lumber Sales Corp.*, La. App. 1934, 154 So. 645; *see also Horrell v. Gulf & Valley Cotton Oil Co.*, La. App. 1930, 131 So. 709. Indeed, in the recent case of *Doss v. American Ventures, Inc.*, 1972, 261 So.2d 615, the Louisiana Supreme Court held that American, the owner-lessor of a building that was nearly destroyed by a hurricane, was liable for workmen's compensation to the injured employee of a contractor hired to rebuild the structure, on the ground that American was engaged in the construction business when the employee was injured since, at the time of the injury, American was acting as its own general contractor for the project. *See also Gray v. Louisiana Power and Light Co.*, La. App. 1971, 247 S.2d 137, where the court held that, because LP&L acted as its own general contractor in erecting towers for power transmission lines, it was the statutory employer of an injured worker employed by a sub-contractor hired to construct the foundation on which to erect the towers.

In the present case, the general welding and pipe fitting work that Chevron hired Mechanical to do and that Cole was performing when injured was part of

a complex plan of expansion and renovation which Chevron established soon after the Belle Chasse plant was opened in 1943 and which proceeded rather continuously over the following 26 years, dependent only on economic activity. Over 100 tanks, innumerable pipes, and various types of other equipment for producing petro-chemicals were added, and the value of the plant was increased some 25 times.

Significantly, the expansion of the Belle Chasse facilities was always directly supervised by Chevron itself. The company employed a full-time maintenance crew of 35 men, each of whom were trained as welders and pipefitters and cross-trained as carpenters and electricians. Depending upon the size of a particular project and the workload of the maintenance crew at the time, Chevron would either have its own staff do the construction and renovation work, or it would contract out part or all of the work. However, even when the work was contracted out, Chevron acted as its own general contractor. Chevron's engineers prepared the blueprints, planned the schedule for each project, coordinated the work schedules among the various projects, and as the work progressed on each project intermittently made quality control tests.

Below, the district court granted a judgment N.O.V. in favor of Chevron on the basis that there was no substantial evidence to support the jury's verdict. The proper standard for granting a directed verdict or judgment N.O.V., and for reviewing the granting or denial of such motions on appeal, has been exhaustively explained in *Boeing Co. v. Shipman*, 5 Cir. 1969, 411 F.2d 365, 374-76. Basically, granting the motions

is proper when, viewing all of the evidence and all of the reasonable inferences that can be drawn therefrom most favorably toward the party opposed to the motion but without weighing the evidence or inferences and without determining the credibility of the witnesses, the facts and legitimate inferences point so overwhelmingly in favor of the moving party that reasonable men could not arrive at a contrary decision.

Applying these principles to the instant case, we determine that the granting of Chevron's motion for a judgment N.O.V. by the district court was proper. The uncontroverted evidence conclusively established that a number of Chevron's full-time employees were regularly engaged in the same type of work as being performed by Mechanical and Cole, that Chevron had been in the process of modernizing and expanding its Belle Chasse facilities on a continuous basis for over a quarter century, that throughout this period Chevron had as a matter of course acted as its own general contractor for the work which its own maintenance crew did not have the time to handle, and that Mechanical was but a sub-contractor on this project. Thus, as in *Owen v. Kaiser Aluminum and Chemical Corp.*, 5 Cir. 1969, 417 F.2d 303, it is clear that La. Rev. Stat. Ann. § 23:1061 applies.

Moreover, unlike the sugar refinery in *Moak v. Link-Belt Co.*, La. App. 1970, 229 So.2d 395, the evidence here shows that Chevron could not have continued to operate its business indefinitely without completing the expansion and renovation work undertaken by Mechanical. The uncontroverted testimony of the opera-

tions manager of the Belle Chasse plant, Mr. Estopinnal, which was the only relevant evidence regarding the necessity or essentiality of Mechanical's work for Chevron, was to the effect that, although Chevron presumably would have been able to continue its operations at the plant for the time being without the work being done, the modernization and expansion of the Belle Chasse plant would somehow have been finished — even if Mechanical had refused to perform under the terms of the contract — because the work was essential to the plant's continued efficient and competitive operation.

In short, we agree with the district court that there was no substantial evidence to support the jury's finding that the work which Mechanical was hired to do was not part of Chevron's "trade, business, or occupation." Even when the record is viewed in the light most favorable to Cole, the evidence that Chevron is Cole's statutory employer is completely overwhelming; we cannot conceive how reasonable men could reach a different conclusion.

Contractual Indemnity.

The only other issue on appeal, involving Chevron's third-party complaint against Mechanical, is whether under Louisiana law indemnity is owed when the indemnitee is wholly or partially at fault and the indemnity agreement fails to expressly require indemnification for accidents resulting from the indemnitee's negligence. A careful review of the relevant Louisiana cases convinces us that indemnity is not owed in such a situation.

The pertinent contractual provision between Chevron and Mechanical was:

> General Liability: CONTRACTOR shall indemnify and save COMPANY harmless from and against any and all loss, damage, injury, liability, and claims thereof for injuries to or death of persons, and all loss of or damage to property of others, resulting directly or indirectly from CONTRACTOR'S performance of this contract.

Based on a finding of concurrent negligence on the part of both the indemnitor, Mechanical, and the indemnitee, Chevron, the district court held that Chevron was entitled to indemnity under the agreement. Since Mechanical's negligence partially caused Cole's accident, the court reasoned that his consequent injuries were embraced by the phrase "resulting directly or indirectly from CONTRACTOR'S performance."

We disagree. Louisiana law is clearly to the effect that the failure of the parties to refer expressly to "negligence" in an indemnity contract is evidence of the parties, intention not to provide indemnification for the indemnitee's negligent acts. *Bagwell v. South Louisiana Electric Co-op Assoc.*, La. App. 1969, 228 So.2d 555; *Arnold v. Stupp Corp.*, La. App. 1967, 205 So.2d 797; *see Plantation Pipeline Co. v. Kaiser Aluminum and Chemical Corp.*, La. App. 1969, 222 So.2d 905; *Elephant, Inc. v. Hartford Accident & Indemnity Co.*, La. App. 1968, 216 So.2d 837; *Brady v. American Insurance Co.*, La. App. 1967, 198 So.2d 907. The parties' clear and unequivocal intent to indemnify against damages

caused solely by the indemnitee's own negligence must be expressly articulated by specific reference to "negligence." Otherwise, the presumption is that the indemnification is applicable only to vicarious responsibility of the indemnitee resulting from negligent acts of the indemnitor. *Bagwell v. South Louisiana Electric Co-op Assoc., supra; Arnold v. Stupp Corp., supra. Garsalitz v. Olin Mathieson Chemical Corp.*, 5 Cir. 1970, 429 F.2d 1033; and *Grigsby v. Costal Marine Service of Texas, Inc.*, 5 Cir. 1969, 412 F.2d 1011. *Compare Jennings v. Ralston Purina Co.*, La. App. 1967, 201 So.2d 168.

These same precepts and presumptions are equally applicable where the damage is caused by the *concurrent* negligence of the indemnitee and indemnitor, rather than by the indemnitee's sole negligence. In the recent case of *Strickland v. Nutt*, La. App. 1972, 264 So.2d 317, which involved a finding of concurrent negligence and an indemnity agreement remarkably similar to the one in the case *sub judice*, the Louisiana court specifically rejected the district court's decision below in the present case, *Cole v. Chevron Chemical Co.*, E.D. La. 1971, 334 F.Supp. 263, and denied indemnity.

> We reject the proposition that indemnity contracts should be interpreted differently depending on whether the indemnitee is solely negligent or there is concurrent negligence on the part of both indemnitee and indemnitor. We are aware of the case of Cole v. Chevron Chemical Company-Oronite Division, 334

F.Supp. 263 (U.S.D.C., E.D. La. 1971) wherein the Federal District Judge indicated that the holding of Jennings v. Ralston Purina Co., 201 So.2d 168 (La. App. 2d Cir. 1967) and Arnold v. Stupp Corp., 205 So.2d 797 (La. App. 1st Cir. 1967) were applicable only where there was sole negligence on the part of the indemnitee. We agree rather with the language of the U.S. Fifth Circuit Court of Appeals in Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684 (1970) that,

> "Although in Batson-Cook [Batson-Cook Company v. Industrial Steel Erectors, 5 Cir., 257 F.2d 410] the indemnitor was not negligent and the damage was caused solely by the negligence of the indemnitee, the rule requiring specificity of the intent to indemnify for the indemnitee's own negligence is equally applicable in situations where, as here, the concurring negligence of the indemnitee and indemnitor causes the damage. See United States v. Seckinger, 5 Cir. 1969, 408 F.2d 146, reversed on other grounds 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (October 13, 1969)."

We are of the opinion that the above language sets forth the better rule for interpreting indemnity agreements and that the Courts of this state should adopt that rule. . . .

264 So.2d at 323.

Accordingly, because the jury found that Cole's injuries were proximately caused by Chevron's negligence and since the indemnity agreement does not use the talismanic word "negligence" or otherwise make unequivocally clear the parties' intent to indemnify for injuries caused, in part or in whole, by the negligence of the indemnitee, we conclude that Chevron is not entitled to recover under the indemnification provision of the contract.

The district court's judgment N.O.V. in favor of Chevron is affirmed. The judgment of the district court that Mechanical must indemnify Chevron for its costs of defense and for any damages owed to Cole as a result of the injuries he sustained at the Belle Chasse plant in 1968 is reversed with directions to enter judgment for Mechanical.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX XI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-1025

D. C. Docket No. 68-1943 Sec "C"

WILLIAM F. COLE,
Plaintiff-Appellant,

versus

CHEVRON CHEMICAL COMPANY - ORONITE DIVISION,
Defendant-Appellee,

MECHANICAL CONTRACTING ENGINEERS, INC., and LIBERTY MUTUAL INSURANCE COMPANY,
Third Party Defendants-Appellees-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part with directions to enter judgment for Mechanical in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to third party defendants-appellees-appellants, Mechanical Contracting Engineers, Inc., the costs on appeal to be taxed by the Clerk of this Court.

April 23, 1973

Issued as Mandate:

APPENDIX XII

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1025

WILLIAM F. COLE,
Plaintiff-Appellant,

versus

CHEVRON CHEMICAL COMPANY - ORONITE DIVISION,
Defendant-Appellee,

MECHANICAL CONTRACTING ENGINEERS, INC., and LIBERTY MUTUAL INSURANCE COMPANY,
Third Party Defendants-Appellees-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion April 23, 1973, 5 Cir., 1973, ____ F.2d ____).

(June 19, 1973)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: The Petition for Rehearing filed on behalf of Chevron Chemical Company — Oronite Division, is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.